National Labor Relations Board

Weekly Summary of NLRB Cases

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C A S E S S U M M A R I Z E D
VISIT WWW.NLRB.GOV FULL TEXT

BellSouth Telecommunications, Inc.	Atlanta, GA	1
E.I. du Pont de Nemours & Co..	Tonawanda, NY	1
Marquette Transportation/Bluegrass Marine	Paducah, KY	3
Midwestern Personnel Services, Inc.	Olive Branch, MS and Louisville, KY	3
New Seasons, Inc.	Manchester, CT	4
The Strand Theatre of Shreveport Corp.	Shreveport, LA	5
Unifirst Corp..	Indian Orchard, MA	6

OTHER CONTENTS

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BellSouth Telecommunications, Inc. and Communications Workers (11-CA-17096, 17140, 11-CB-2688, 2699; 346 NLRB No. 59) Atlanta, GA Feb. 28, 2006. On remand from the U.S. Court of Appeals for the Fourth Circuit, the Board held that BellSouth Telecommunications, Inc. violated Section 8(a)(1), (2), and (3) of the Act and that the Communications Workers violated Section 8(b)(1)(A) and (2) of the Act, as alleged, by entering into a contractual provision requiring employees in specified job classifications, and those who had contract with the public, to wear a uniform bearing both the BellSouth and CWA logos. The Board required the Respondents to rescind any contractual provisions which mandate the wearing of the CWA logo on uniforms, and to post notices in all locations where unit employees covered by those contractual provisions are employed. [HTML] [PDF]

In an earlier decision reported at 335 NLRB 1066 (2001), the Board found that the Respondents did not violate the Act, as alleged. It specifically found that the Respondents could lawfully agree to and implement a policy requiring employees to wear a company uniform that displays both the BellSouth and CWA logos despite the objections of certain employees to displaying the CWA logo. Although recognizing that the compelled wearing of the CWA logo implicated employees' Section 7 rights to refrain from engaging in activities in support of a labor organization, the Board found that the Section 7 interest was outweighed by special circumstances underlying the collectively bargained uniform policy.

The court granted the Charging Party Individuals' petition for review and vacated the Board's dismissal order based on its finding that the Respondents had violated the Act. The court held that the Board's finding of special circumstances validating the uniform policy was not supported by substantial evidence and that "(b)y paying to place the union logo on the uniforms and making the wearing of the union logo on uniforms a condition of employment, BellSouth violated Section 8(a)(1), (2), and (3) of the Act. Similarly, CWA violated Section 8(b)(1)(A) and 8(b)(2) of the Act by proposing and agreeing to require employees to wear the union logo and by accepting BellSouth's financial support." 393 F.3d at 497. The court remanded the proceeding to the Board with directions to modify its order consistent with the court's opinion.

(Chairman Battista and Members Liebman and Schaumber participated.)

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E.I. du Pont de Nemours & Co. (3-CA-22854, et al.; 346 NLRB No. 55) Tonawanda, NY Feb. 27, 2006. The Board adopted the administrative law judge's findings that the Respondent's failure adequately to respond to the Union's (PACE International and its Local I-6992) information requests violated Section 8(a)(5) of the Act and prevented a lawful impasse in negotiations over subcontracting milling and finishing work. Thus, the Respondent's subsequent subcontracting of this work in the absence of a lawful impasse further violated Section 8(a)(5). It also adopted the judge's finding that the Respondent violated Section 8(a)(5) by failing adequately to respond to the Union's request for information with regard to the discipline of Supervisor Angelo Paradise. [HTML] [PDF]

Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(5) by declaring impasse in contract negotiations and implementing the terms of its final contract offer and by unilaterally changing the employees' healthcare benefits. The judge found that the Respondent rigidly and unreasonably fragmented negotiations by removing discussion of milling and finishing work from its negotiation of other issues and that the Respondent's unlawful bifurcation of bargaining tainted the impasse in contract negotiations. Chairman Battista and Member Schaumber concluded that it was not unlawful for the Respondent to separate out, from general bargaining, the issue of subcontracting the milling and finishing work, noting the parties' history of piecemeal bargaining and that the work was not even in the unit and had been subcontracted for about 10 years. They also concluded that the parties were at impasse over the Respondent's healthcare proposal and, therefore, the Respondent could lawfully implement its plan.

Member Liebman disagreed with her colleagues' reversal of the judge's findings. She wrote: "The majority's failure to hold the Respondent fully responsible for its attempts to divide and conquer the unit by bifurcating bargaining (over the Union's objections) and then by declaring impasse with respect to most issues effectively vindicates the Respondent's attempt to marginalize the Union. Similarly, the majority endorses the unlawful implementation of the Respondent's health insurance proposal, which grants the Respondent wide-ranging discretion to make ongoing changes in this area without further bargaining. I dissent from these aspects of the majority's decision."

In the absence of exceptions, the Board approved the judge's finding that the Respondent violated Section 8(a)(5) and (1) by: (1) delaying providing information in response to the Union's Sept. 28, 2000 information request until March 12, 2001; (2) failing adequately to respond to the Union's Jan. 19, 2001 request for information regarding gifts and incentives; (3) denying union representatives access to certain facilities to investigate potential grievances and refusing to bargain over visitation of jobsites where bargaining unit work was being performed; and violated Section 8(a)(1) by threatening union representatives with discipline if they failed to leave the Tonawanda facility. No exceptions were filed to the judge's recommended dismissals.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by PACE International and its Local 1-6992; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Buffalo on various dates between Feb. 11 and July 16, 2002. Adm. Law Judge John T. Clark issued his decision Dec. 24, 2003.

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Marquette Transportation/Bluegrass Marine (26-CA-18650; 346 NLRB No. 54) Paducah, KY Feb. 27, 2006. Affirming the administrative law judge's supplemental decision, the Board found that the Respondent's tugboat pilots were supervisors and therefore, dismissed the complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating the pilots for participating in a strike and by making various statements to them. [HTML] [PDF]

Member Liebman concurred in the dismissal only because the material facts concerning the supervisory issue cannot be meaningfully distinguished from those in current Board precedent involving the same pilot classifications in which supervisory status was found. See *Alter Barge Line, Inc*., 336 NLRB 1266 fn. 1 (2001); *Ingram Barge Co*., 336 NLRB 1259 fn. 1 (2001).

In his original decision, the judge found that the Respondent's tugboat pilots were not supervisors and that the Respondent violated Section 8(a)(3) and (1), as alleged. On June 28, 2001, the Board remanded the case to the judge for further consideration in light of *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001); and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Pilots Agree Association of the Great Lakes and Rivers Maritime Region Membership Group, Masters, Mates and Pilots, ILA; complaint alleged violation of Section 8(a)(1) and (3). Adm. Law Judge Lawrence W. Cullen issued his decision June 30, 1999 and his supplemental decision Aug. 28, 2001.

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Midwestern Personnel Services, Inc. (25-CA-25503, et al.; 346 NLRB No. 58) Olive Branch, MS and Louisville, KY Feb. 28, 2006. Chairman Battista and Member Walsh, with Member Schaumber dissenting in part, adopted the administrative law judge's recommendations and ordered the Respondent to pay 24 individuals backpay amounts totaling $649,593.93. [HTML] [PDF]

The Board found in 2000 that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate its truckdrivers, who had commenced an unfair labor practice strike on Jan. 17, 1998, after Teamsters Local 215 made an unconditional offer to return to work on their behalf on March 27, 1998. *Midwestern Personnel Services*, 331 NLRB 348 (2000), enfd. 322 F.3d 969 (7th Cir. 2003). The issues presented in this backpay proceeding are whether the Respondent made a valid offer of reinstatement to the discriminatees on April 12, 1999, and whether the Respondent sustained its burden of showing that any of the discriminatees failed to make a reasonable search for interim employment.

The Board found that the Respondent's April 12 letter was not a valid offer of reinstatement sufficient to toll backpay because the positions were not substantially equivalent to those the discrminatees previously held as they would not have retained their rates of pay or seniority. It accordingly found that an evaluation of the discriminatees' response to the letter is unnecessary.

The Respondent filed exceptions to the judge's recommended amounts of backpay for 12 of the 24 discriminatees: Timothy Cronin, Jerry Fickas, Greg Harris, Wade Carter, Robert Linendoll Jr., Scott Taylor, Randal Underhill, Garry Williams, David Wyatt, Henry Langdon, Randy Leinenbach, and Christopher Pentecost. In support of its position that these 12 discriminatees should not receive either part or all of the backpay awarded by the judge, the Respondent called an expert witness, Dr. Malcolm Cohen, to testify about the conditions of the job market at the time in question.

Chairman Battista and Member Walsh found, as did the judge, that Dr. Cohen's report and testimony were insufficient to meet the Respondent's burden of demonstrating that the discriminatees failed to seek interim employment with due diligence. Turning to the individual discriminatees, they found that the Respondent failed to establish that any of them failed to exercise reasonable diligence in their search for interim employment and adopted the judge's backpay awards.

Member Schaumber agreed with his colleagues in all respects except their decision to affirm the judge's awards of full backpay to Langdon, Leinenbach, and Pentecost. He wrote: "Each of these individuals was an experienced truckdriver employed by the Respondent at it facilities in Indiana and Kentucky prior to a strike in 1998. Their remarkable lack of success in obtaining interim employment for many months at a time, despite a strong job market for truckdrivers, is, in my view, a predictable consequence of their sporadic and desultory efforts to obtain work. Accordingly, I decline to hold the Respondent liable for all their lost income." Member Schaumber would reduce Langdon's backpay award by an amount equal to 6 months' pay, find that Leinenbach was not entitled to a backpay award, and deny Pentecost backpay for the last three quarters of 1999.

(Chairman Battista and Members Schaumber and Walsh participated.)

Adm. Law Judge Ira Sandron issued his supplemental decision July 22, 2004

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New Seasons, Inc. (34-CA-10946; 346 NLRB No. 57) Manchester, CT Feb. 28, 2006. The Board agreed with the administrative law judge's conclusions that the Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by failing to continue in effect the terms and conditions of its 2003-2005 collective-bargaining agreement with New England Health Care Employees District 1199 SEIU by, without the Union's consent, modifying the language of article 13(L), a subject that was outside the scope of the existing collective-bargaining

agreement's reopener clause; and violated Section 8(a)(5) and (1) by unilaterally implementing changes to article 13(F) of that agreement, and by voiding the December 2000 settlement agreement. The Board modified the judge's recommended order to conform with its findings and, at the request of the General Counsel, included a make-whole remedy to the decision and order. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by New England Health Care Employees District 1199 SEIU; complaint alleged violation of Section 8(a)(1) and (5) and Section 8(d). Hearing at Hartford on Feb. 23, 2005. Adm. Law Judge Wallace H. Nations issued his decision July 8, 2005.

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The Strand Theatre of Shreveport Corp. (15-CA-17548; 346 NLRB No. 51) Shreveport, LA Feb. 27, 2006. The Board affirmed the findings of the administrative law judge and held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain in good faith with Stage Employees IATSE Local 298 as the exclusive collective-bargaining representative of employees in the appropriate unit, unilaterally ceasing the application of the terms and conditions set out in the 1999-2004 (as extended) collective-bargaining agreement to unit employees, and eliminating the position of Regular Employee without prior notice to and without affording the Union an opportunity to bargain with respect to this conduct and its effects. The Respondent also violated Section 8(a)(5) and (1) by failing to use the Union's hiring hall in hiring its employees without prior notice to or affording the Union an opportunity to bargain with respect to this conduct and its effects, insisting that it would not reach agreement with the Union on a collective-bargaining agreement and insisting on changing the scope of the unit, and refusing to hire employees affiliated with the Union's hiring hall. [HTML] [PDF]

In view of their agreement with the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally eliminating employee Steve Palmer's "Regular Employee" position, Chairman Battista and Member Schaumber found it unnecessary to pass on the judge's finding that Palmer's termination violated Section 8(a)(3) because that additional finding would not materially affect the reinstatement and make-whole remedy for Palmer. Member Liebman, in agreement with the judge, found that Palmer's termination violated Section 8(a)(3) as alleged.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Stage Employees IATSE Local 298; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Shreveport, April 25-26, 2005. Adm. Law Judge John H. West issued his decision Aug. 3, 2005.

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Unifirst Corp. (1-CA-39267, 39321; 346 NLRB No. 52) Indian Orchard, MA Feb. 28, 2006. Chairman Battista and Member Schaumber dismissed the complaint, reversing the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by making impermissible promises of benefits to employees, indicating that employees could only obtain the Respondent's 401(k) plan and profit sharing plan by decertifying Laundry Workers Local 66L, a/w UNITE, polling employees' sentiments in an atmosphere tainted by an unremedied unfair labor practice; and that the Respondent's subsequent reliance on the poll results to withdraw recognition, withhold requested information, and refuse to bargain with the Union violated Section 8(a)(5). Finding that the Respondent did not make impermissible promises of benefits and that its poll was lawful, the majority held that Respondent's subsequent actions were likewise lawful, as the Respondent had evidence that the Union had actually lost majority support. [HTML] [PDF]

Dissenting, Member Liebman wrote: "This case turns primarily on whether the Respondent's officials unlawfully told employees that if they voted the Union out, they would have profit sharing and a 401(k) plan, but if they kept the Union in, they could get neither benefit. If this statement was made, then it was clearly unlawful and tainted . . . ." In her view, the judge correctly found that the statements of the Respondent's managers violated Section 8(a)(1), that its subsequent poll of employees was tainted by unfair labor practices, and that the Respondent unlawfully withdrew recognition from the Union. Member Liebman contended that the majority also erred in reversing the judge's alternative holding with respect to the poll: that it was unlawful because it was taken while a decertification petition was pending. She said the judge's alternative conclusion was mandated by Board precedent, which the majority fails to heed.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Laundry Workers Local 66L, a/w UNITE; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Northampton, April 29-30 and May 1 and 9, 2002. Adm. Law Judge Wallace H. Nations issued his decision March 18, 2003.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

ATC, LLC d/b/a ATC of Nevada (Transit Union Local 1637) Las Vegas, NV Feb. 27, 2006. 28-CA-20076, 20197; JD(SF)-13-06, Judge William G. Kocol.

Nordstrom, Inc. (UNITE HERE Local 71JT) Seattle, WA March 2, 2006. 19-CA-29729; JD(SF)-03-06, Judge Mary Miller Cracraft.

Mid-Atlantic Regional Council of Carpenters (Goodell, Devries, Leech & Dann, LLP) Cockeysville, MD March 2, 2006. 5-CC-1289; JD-16-06, Judge Eric M. Fine.

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TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Standard Register Co. (Graphic Communications Conference/Teamsters Local 582-M) (5-CA-32798; 346 NLRB No. 56) Salisbury, MD Feb. 28, 2006. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Lucht's Concrete Pumping, Inc., Denver, CO, et al. and Cheyenne, WY, 27-RC-8414, March 3, 2006 (Members Liebman, Schaumber, and Kirsanow)

DECISION AND ORDER [remanding to Regional Director for further appropriate action]

American Medical Response, Fort Wayne, IN, 25-RC-10310, March 3, 2006 (Members Liebman, Schaumber, and Kirsanow)

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